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IN THE

Supreme Court of the United States

October Term, 1965
No. 49

EDWARD MISHKIN,

Appellant,

vs.

STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of the State of New York.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case.

Mishkin v. New York is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On Dec. 29, 1959, police officers visited a book store known as Publisher's Outlet, located at 254 West 42nd Street, New York. There they confiscated 201 copies of 25 different books[1] and placed the man in

[1]A single copy of each of the 25 books was identified and admitted into evidence as Exhibits 43-67. The titles identify the materials as predominantly "sado-masochistic" in nature. See "The Smut-Peddlers," by James Jackson Kilpatrick, 1960, published by Avon in paperback form by arrangement with Doubleday and Co., pp. 98-218. The titles, number of copies seized and nature of the count filed are shown below. The trial court found appellant guilty on all counts, except as noted. (N.G.) indicate "not guilty." (R) indicates "guilty," but reversed on appeal.

charge and two others on the premises under arrest [R. 157].

On the same day, the police visited a second book store in the area, known as the Midget Book Shop, located at 228 West 42nd Street. There they confis-

Exhibit	Book Title and Number of Copies Seized	—COUNTS IN INFORMATION— Possession	Publishing	Hiring Others	Gen. Business Law No Identification of Publisher and Printer
43	Columns of Agony (5)	37	95	144	192(R)
44	The Tainted Pleasure (1)	38	96	145	193(R)
45	Intense Desire (5)	39	97	146	—
46	The Hours of Torture (20)	40	76	124	173(R)
47	Bound In Rubber (17)	41	77	125	—
48	Arduous Figure Training at Bondhaven (25)	42	78	126	—
49	Return Visit to Fetterland (2)	43	79	127	—
50	Women In Distress (4)	44	81	129	—
51	Pleasure Parade No. 4 (4)	45	85	133	—
52	Pleasure Parade No. 3 (6)	46	84	132	—
53	Pleasure Parade No. 2 (6)	47	83	131	—
54	Pleasure Parade No. 1 (8)	48	82	130	—
55	Sorority Girls Stingent Intiation (18)	49	98	147	—
56	Terror At The Bizzare Museum (14)	50	99	148	—
57	Screaming Flesh (10)	51	86	134	174(R)
58	Fury (3)	52	—	—	—
59	Masque (2)	53	88(N.G.)	136(N.G.)	176(N.G.)
60	Temptation (8)	57	100(N.G.)	149(N.G.)	194(N.G.)
61	Peggy's Distress On Planet Venus (6)	58	101	150	—
62	Ways of Discipline (8)	59	102	151	—
63	Mrs. Tyrants Finishing School (2)	60	103	152	—
64	Perilous Assignment (9)	61	104	153	—
65	French Girl on the Stairs, Part 2 (6)	—	—	—	184(N.G.)
66	Tattletales (1)	—	—	—	186(R)
67	Look At Her Motor Turn Over (1)	—	—	—	187(R)

cated 10 copies of one book[2] [R. 151]. The man in charge, William Schenkman was placed under arrest [R. 160].

On Jan. 12, 1960 (14 days later) a search warrant was issued by the Felony Branch of the Magistrates Court of New York County to search the premises at 37 West 20th Street, New York [R. 135]. In executing the search warrant 16,859 copies of 42 different titles[3] were confiscated from a basement storage bunker, approximately 25 ft. x 30 ft. x 12 ft. high, located at that address.

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[2]A single copy was identified and admitted into evidence as Exhibit 68. The title identifies the material as "sado-masochistic—bondage." See "The Smut Peddlers, *supra*, at pp. 37, 67, 123, 218. The title, number of copies seized and nature of the count filed are shown below. The trial court found appellant guilty on both counts.

		—COUNTS IN INFORMATION—			
Exhibit	Book Title and Number of Copies Seized	Possession	Publishing	Hiring Others	Gen. Business Law No Identification of Publisher and Printer
68	Bondage Correspondent (10)	—	107	156	—

[3]A single copy of each of the 42 books was identified and admitted into evidence as Exhibits 1-42. The titles identify the materials as predominantly "sado-masochistic." The titles, number of copies seized, and nature of the count filed are shown below. The trial court found appellant guilty on all counts, except as noted: (N.G.) indicates "not guilty"; (R) indicates "guilty," but reversed on appeal.

		—COUNTS IN INFORMATION—			
Exhibit	Book Title and Number of Copies Seized	Possession	Publishing	Hiring Others	Gen. Business Law No Identification of Publisher and Printer
1	Chances Go Around (158)	1	63	111	160(R)
2	Impact (184)	2	64	112	161(R)
3	Female Sultan (273)	3	65	113	162(R)
4	Satin Satelite (300)	4	66(N.G.)	114(N.G.)	163(N.G.)
5	Her Highness (1466)	5	67	115	164(R)
6	Mistress of Leather (9)	6	68	116	165(R)
7	Educating Edna (35)	7	69	117	166(R)
8	Strange Passions (200)	8	70	118	167(R)
9	The Whipping Chorus Girls (35)	9	71	119	168(R)

On Dec. 30, 1958, just one year prior to the above police actions, a New York detective had visited the first of the above book stores (Publisher's Outlet) where he purchased a copy of "Queen Bee." At that time he seized 21 copies of the same book [R. 164] and arrested the

10	Order of the Day and Bound Maritally (85)	10	72	120	169(R)
11	Dance With The Dominant Whip (225)	11	73	121	170(R)
12	Cult of the Spankers (55)	12	74	122	171(R)
13	Confessions (23)	13	75	123	172(R)
14	The Hours of Torture (650)	14	76	124	173(R)
15	Bound In Rubber (406)	15	77	125	—
16	Arduous Figure Training at Bondhaven (515)	16	78	126	—
17	Return Visit to Fetterland (430)	17	79	127	—
18	Fearful Ordeal in Restraintland (150)	18	80	128	—
19	Women In Distress (215)	19	81	129	—
20	Pleasure Parade No. 1 (1380)	20	82	130	—
21	Screaming Flesh (35)	21	86	134	174(R)
22	Fury (626)	22	—	—	—
23	So Firm So Fully Packed (415)	23	87	135	175(R)
24	I'll Try Anything Twice (66)	24	—	—	—
25	Masque (870)	25	88(N.G.)	136(N.G.)	176(N.G.)
26	Catanis (206)	26	—	—	—
27	Violated Wrestler (315)	27	89	137	177(R)
28	Betrayal (85)	28	—	—	—
29	Swish Bottom (57)	29	90	138	178(R)
30	Raw Dames (208)	30	91	139	179(R)
31	The Strap Returns (50)	31	92	140	180(R)
32	Dangerous Years (115)	32	93	141	181(R)
33	Run Girl, Run Hard (160)	—	—	142(N.G.)	—
34	This Way Down (59)	—	—	—	182(R)
35	The French Girl on the Stairs, Part 1	—	—	—	183(N.G.)
36	The French Girl on the Stairs, Part 2 (224)	—	—	—	184(N.G.)
37	Smooth and Sassy (2170)	—	—	—	185(R)
38	Tattletales (1485)	—	—	—	186(R)
39	Look At Her Motor Turn Over (359)	—	—	—	187(R)
40	Sex Switch (1900)	—	—	—	188(R)
41	The Hollywood Spankers (320)	—	—	—	189(R)
42	Anecdotia Spankiana (340)	—	—	—	190(R)

seller, Herman Schenkman [R. 166]. Thereafter Herman Schenkman was tried on a charge of violating the obscenity laws in connection with his sale of "Queen Bee." On January 25, 1960 the Court of Special Sessions of the City of New York found Schenkman guilty of the obscenity charge.[4]

On Feb. 10, 1960, the police visited a third book store, known as the Main Stem Book Store, located at 1607 Broadway, New York. There they confiscated 17 copies of three books.[5] [R. 154]. The record does not

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[4] *N. Y. v. Herman H. Schenkman,* 195 N.Y.S. 2d 570 (Jan. 25, 1960). See also *N. Y. v. Nathan Goldstein, N. Y. v. Lewis Schaeffer* and *N. Y. v. Joseph Kleinberg and Louis Finkelstein,* reported in the same decision. The *Schaeffer* and *Finkelstein* cases similarly involved the sale of "Queen Bee." In *N. Y. v. Finkelstein and Schaeffer,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367 (May 17, 1962), the New York Court of Appeals held "Queen Bee" obscene and affirmed the convictions of Finkelstein and Schaeffer. The Supreme Court of the United States denied a writ of certiorari in *Finkelstein v. U.S.,* 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962). Only Justice Douglas voted to grant certiorari. The 22 copies of "Queen Bee" seized in the *Schenkman* case (*supra*) were identified and admitted into evidence at appellant's trial as Exhibits 72 and 72,[1] relating to counts 110, 159 and 198. No search and seizure issue can be raised as to Exhibit 72 and its admissibility in evidence is beyond question. The trial court's findings were "guilty" on all counts. (R) indicates "guilty," but reversed on appeal.

		—COUNTS IN INFORMATION—			
Exhibit	Book Title and Number of Copies Seized	Possession	Publishing	Hiring Others	Gen. Business Law [No Identification of Publisher and Printer]
72	Queen Bee	—	110	159	198(R)

[5] A single copy of each of the 3 books was identified and admitted into evidence as Exhibits 69-71. The titles, number of copies seized, and nature of the count filed are shown below. The trial court found appellant guilty on all counts. (R) indicates "guilty," but reversed on appeal.

		—COUNTS IN INFORMATION—			
Exhibit	Book Title and Number of Copies Seized	Possession	Publishing	Hiring Others	Gen. Business Law [No Identification and Printer]
69	Woman Impelled (11)	—	106	155	—
70	Eye Witness (1)	—	108	157	196(R)
71	Stud Broad (5)	—	109	158	197(R)

reflect what person(s) were arrested at the time of the seizure.

Testimony was presented to the Grand Jury and thereafter, on March 8, 1960, the District Attorney at the direction of the Grand Jury, filed an information, charging the defendant-appellant with the following:

Counts 1 to 62 inclusive, with possession with intent to sell, of a number of books alleged to be "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting." On the motion of the People, Counts 33, 34, 35, 36, 54, 55, 56 and 62, were dismissed before the trial.

Counts 63 to 110 inclusive, with publishing, manufacturing and preparing a number of books alleged to be within the proscription of subdivision 1 of Section 1141 of the Penal Law. On the Motion of the People, Counts 94 and 105 were dismissed before trial.

Counts 111 to 159 inclusive, with unlawfully hiring, employing, using and permitting other persons to design, print, utter, publish, manufacture and prepare a quantity of books alleged to be within the proscription of subdivision 1 of Section 1141 of the Penal Law. On the motion of the People, Counts 143 and 154 were dismissed before trial.

Counts 160 to 198 inclusive, with failing to imprint the true name and address of the publisher or printer on the books described in those Counts, in violation of Sections 330 and 331 of the General Business Law. On the motion of the People, Counts 191 and 195 were dismissed before trial.

The People called twenty-two witnesses, including two printers, three writers, two artists, a typing service operator, two book binders, the accountant for "Publisher's Outlet" and a retail store owner, buying from appellant at wholesale.

Norman Levenberg, a printer, testified as follows: He had known Mr. Mishkin, the appellant for about twelve years [R. 174]. He identified exhibits 1 through 72 [R. 200-251] and said that he had printed all, except exhibits 31, 32 and 33, at the request of appellant [R. 175]. Appellant's work represented ¾ of his total printing work. Appellant paid in cash and would not give him a bill [R. 300].

The procedure was as follows [R. 179]; Appellant would call him to his store and hand him either a typed manuscript or a previously printed book. In the case of a manuscript he would give the same to a typesetter, Dorothy Yeeto [R. 253], who would set the type. After the type was set, he would photograph the pages, strip the negatives into a book form and print the same on flat sheets. He would then give the flat sheets to either York Bindery or Hudson Bindery [R. 253] who would make it up into a book. In the case of a previously printed book he would pull the book apart, photograph the pages and go through the same procedure [R. 180]. Appellant would give him the drawings for the cover [R. 255-272] and tell him what price to put on the cover [R. 180]; being, 3.50, 5, 6, 10 and 15 dollars per copy. Appellant told him the books had to have a publisher's name and address on the back and that he should make up any name and address. He never put appellant's name on the books [R. 181]. He printed between 1000 and 3500 copies of each of

the exhibits between March 1958 and March 1960, and identified the approximate number printed and the printing date [R. 200-251].

After he finished each printing job he would take 50 books to the Publisher's Outlet and 50 books to the Midget Book Shop [R. 182] and the rest of the books would go into a warehouse [R. 182]. He would then get paid by appellant [R. 192]. He was paid 40 cents for a thick book and 15-20 cents for a thin one [R. 193].

About the middle of 1958 at appellant's request he got a new warehouse in Room 908 at 37 West 30th Street, New York, where the books were stored thereafter [R. 185]. His printing business was on the 10th floor in the same building [R. 313]. Although his name was on the lease, appellant would give him $100.00 in cash at the beginning of each month, which he would give to the landlord. He had control of the warehouse [R. 279] and maintained it until November 1959.

Appellant would give him orders on a slip of paper, which he would fill from material in the warehouse and deliver to appellant at a number of stores in the neighborhood. Nine out of ten times this would be the Publisher's Outlet. He would also ship some out of town for appellant [R. 254]. Exhibits 73 A-C in Appellant's handwriting were the last slips of paper with orders given him by Appellant [R. 273] and were given to him in October of 1959 [R. 345]. In October 1959 appellant called him on the phone and told him not to fill the last order and to come down to the store, which he did the next day. At the store, appellant told him not to go near the warehouse because it was hot

[R. 275] and was under surveillance [R. 318]. A week later appellant told him to get rid of everything in the shop [R. 275] and to get the books out if he could [R. 371]. He was pretty nervous because his name was on the lease and so, at the first chance (Nov. 1959), he got the books out of Room 908 and into the basement of the same building at 37 West 20th St. [R. 188]. This was with the consent of the superintendent of the building [R. 365]. The move to the basement was his idea [R. 371].

He rented a store on McDonald Avenue in Brooklyn and began removing the books from the basement, a carton or two at a time to avoid detection. He gave the key to the appellant. He got about ¾ of the books out and ran out of money [R. 314]. He paid about 600 or 700 dollars to the superintendent and porter to move and store the books in the basement and appellant gave him a couple of hundred dollars toward it [R. 367].

He was first contacted by the police by phone the week before New Years[6] and met them the next day in his attorney's office [R. 337]. A couple of weeks later, on January 12, he told the police he would cooperate with them [R. 339], and met them at the building the day they executed the search warrant [R. 363].

Paul Hayman, a printer testified as follows: He had known Mr. Mishkin, the appellant for about eight years. He identified exhibits 31 and 32 as books which he had printed at the request of the appellant in 1959 and delivered to him at the Publisher's Outlet. He printed

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[6]The week before New Years would be on or about the date of the first confiscation, which occurred on December 29, 1959. See page 2.

about 300 copies and was paid .40 a copy for printing and binding [R. 373-380].

Hyman Rosen, a writer, testified that he had known the appellant since the fall of 1954 and wrote several booklets for him and his former partner [R. 395]. He identified[7] exhibits 24, 35 and 36 as having been written by him for appellant. He was paid in cash at the Publisher's Outlet [R. 396-399].

Leotha Hackshaw, a writer, testified she had known the appellant about three of four years [R. 408]. She identified[8] exhibits 26 and 25 as having been written

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[7]Hyman Rosen testified as follows: He had been a writer for 20 years and had written poetry, published a travel book, done fiction, journalism, articles and book reviews for the "New York Times." [R. 395]. He used the pseudonyms John Thomas for Exhibit 24, Colin Ross for Exhibits 35 and 36 and signed a contract with the appellant for the sale of Exhibits 35 and 36, as Harry Roshalenko, in which he stipulated that his name should not appear as the author [Ex. 75]. Appellant described to him what he wanted: Re Exhibit 24: He told appellant that he had a little novel at home. Appellant told him to spice it up and bring it in, which was exactly what he did [R. 396].

[8]Leotha Hackshaw testified as follows: She had written novels, pocket novels and television scripts. She wrote both books under the pseudonym Shaw Lee. Appellant described to her what he wanted: Re Exhibit 26: He wanted "a book in which there were lesbian scenes, the sex had to be very strong, it had to be rough, it had to be clearly spelled out. In other words, I couldn't be subtle about it; I had to write sex very bluntly, make the sex scenes very strong . . ." ". . . he wanted scenes in which women were making love with women, and that sort of thing . . ." [R. 411] ". . . he said he wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men making love to men, and there was spankings and scenes—sex in an abnormal and irregular fashion . . ." [R. 412]. Re Exhibit 25: "He indicated he wanted something with—in this book he wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong . . ." [R. 414].

She did her research at home using, "Sexual Anomalies, Compilations of Case Histories of Lesbians," by Capio and a book by Kraft-Ebling [R. 416, 417]. It took her 3 months on the first book because it took more research and only about a month for the others [R. 417, 418].

by her for appellant [R. 409, 414]. Appellant paid her $200 in cash at the Publisher's Outlet for Exhibit 26 [R. 411, 413].

Kenneth Johnson, a writer, testified he had known the appellant since March of 1955 [R. 425-426]. He identified[9] the following exhibits as having been written for appellant, for the sums indicated: Exhibit 1—

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[9]Kenneth Johnson testified as follows: He had been a writer for 10 years and was presently writing novels and short stories. He had a bachelors degree from Langston University in Langston, Oklahoma and a M.A. degree from Wichita University in Wichita, Kansas, majoring in English and modern languages [R. 425-426]. Appellant described to him what he wanted: Re a four book series: "I want you to write four books with a strong lesbian theme . . ." [R. 428]. Re Exhibit 3: "This is a book that's based on 'House of Dolls' . . . Mr. Mishkin gave me the book . . . I do not know who wrote the 'House of Dolls' . . . I write very fast, and it was approximately a week before I turned the manuscript in to him . . . He wanted a book written on female domination . . ." [R. 431-433]. Re Exhibit 5: "He gave me an unbound book that he wanted me to extend. He wanted me to put a story line behind it and extend it. He wanted me to deal very graphically with the implementation of wheels on a female's body, of the darkening of the flesh under flagellation, and he said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of the flesh when people were being flagellated and he didn't want any blood in it . . ." [R. 434]. Re Exhibit 22(58): "He wanted them to have a strong lesbian theme bearing on a hardback book that I had written called 'Mavis' by Vixen Press . . ." [R. 436]. Re Exhibit 27: "Mr. Mishkin gave me a book that was printed in California about lady wrestlers . . . There was no story line to the book that he gave me, but I took it home, and I read it; and I put a story line behind it and let the girl be raped . . ." [R. 438]. Re Exhibit 30: "Mr. Mishkin gave me eight pictures, and he told me he wanted a story line built around these eight pictures . . . I did it in two days . . ." [R. 441]. Re Exhibit 43: ". . . he told me practically the same thing that he had told me about other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of the flesh and in no blood being let because he wanted not too much violence and in—in wheels appearing on the bodies of the victims because this is what the people who bought these books wanted . . ." [R. 446]. Re Exhibit 60: "He wanted a strong lesbian theme, a book similar to 'Mavis' or 'Fast Curve . . ." [R. 447].

$37; 2—$200; 3—$350; 5—$300; 21(57)—$45; 22-(58)—$225; 23—$100; 27—$100; 28—$220; 29—$100; 30—$150; 32—$165; 33—X; 34—$75; 39(67)—$100; 43—$300; 44—$100; 60—$220; 69—$200; 70—X; 71—$300; 72—$200. He was paid by appellant in cash at either the Main Stem Book Store or the Publisher's Outlet, except that one payment was made at Kingsley Book Store and one at Dinos [R. 427-455].

Ernest Stanton, an artist, testified he had known the appellant since 1955 or 1956 [R. 478]. He identified[10] certain illustrations appearing in exhibits 1, 21, 23, 25, 30, 37 and 71 as having been drawn by him for appellant. He delivered the drawings to appellant at the Publisher's Outlet and was paid $15-$25 in cash per illustration [R. 477-490].

Gene Bilbrew, an artist, testified he had known the appellant since 1954 or 1955 [R. 531]. He identified[11]

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[10]On direct examination at R. 484-485:

Stein: Did he say anything to you when he handed you the script?

Stanton: Yes, he did.

Justice Breslin: He did say something to you?

Stanton: Yes. He said, "Make them sexy, I mean, so that they would be selling—saleable."

Stein: Well, did he tell you what to do with the script?

Stanton: "Read the script; illustrate the story."

[11]On direct examination, at R. 539:

Justice Gassman: Well, how did you know what sort of a cover to put on this without reading the book?

Bilbrew: Well, let's say I would—I, more or less, learn the psychology of the type of work, what's appealing—

Justice Glassman: Psychology of what type of work?

Bilbrew: The work that's here.

On cross-examination, at R. 542:

Kern: Do you recall the type of psychology that was portrayed in that book?

Bilbrew: It was to specify a girl that wore corsets, high-heeled shoes, boots etc.

Kern: Yes; and that's what you meant a while ago when you said that you were familiar with this type of psychology.

certain illustrations appearing in Exhibits 4, 22, 24, 26, 28, 29, 35, 36, 60, 70 and 72 as having been drawn by him for appellant. He delivered the drawing to appellant at the Publisher's Outlet or the book store on 42nd Street and was paid $25-$30 in cash per illustration [R. 530-540]. On cross-examination he said that in 1956 he had been paid by appellant at the Kingsley Book Store on West 42nd Street where he knew appellant was employed [R. 543].

Peter C. Vaccarella, a retail book store owner at 1481 Broadway,[12] testified that he had known appellant for six or seven years [R. 557-558]. He opened the Peter Vaccarella Book Store in March 1, 1958 [R. 558]. He identified Exhibits 4, 23, 24, 26, 28, 37, 38 and 44 as being books, copies of which he had purchased from appellant for from $1.50 to $2 apiece [R. 559-561]. He paid $2 for Satin Satellite (Exhibit 4) and sold it for $4 and $5 [R. 563].

Bilbrew: I just turned it out.

Kern: Right. And you knew Mr. Bilbrew, did you not, that when you were asked to make—to draw a picture for the cover of a book it was for that type of book?

Bilbrew: Correct.

Kern: You heard the term "bondage books."

Bilbrew: I have.

Kern: Flagellation.

Bilbrew: I have.

Kern: High heels, and corsets, and all that sort of thing.

Bilbrew: I have.

Kern: And that was what you had in mind, the type—that type of book.

Bilbrew: Correct.

Bilbrew indicated he was still working for Nutrix Publishing Co. in New Jersey and that his pictures were advertised for sale in a number of their periodicals [R. 540].

[12]Vacarella testified he had been in the publishing business with appellant for two years at 218 W. 47th Street under Telephoto Publ. Corp. The business was terminated in Dec. 1957 [R. 558, 564].

Dorothy Yeeto, the owner of a typing service, testified she did typing for Mr. Norman Levenberg and identified certain exhibits as being her billings for such services. The billings identify the book exhibits by book title and date. She also said she had typed the manuscript of certain book exhibits, which she identified [R. 579-593].

Oscar Schaller, book binder, testified that he did book binding work for Mr. Norman Levenberg and identified certain extracts from his business ledger which reflected the work accomplished. The business records showed billings for Exhibits 2, 4, 5, 8, 9, 10, 11, 27, 37, 38, 40, 41, 43, 45, 71 and 72, by title, number of pages, and date that the binding was done. The binding work was performed within the statute of limitations (two years) [R. 598-608].

The testimony of Lawrence De Nino, a binder at the York Binding in New York County was stipulated to and was as follows: Bookbinding work was done in 1959 for Mr. Norman Levenberg on Exhibits 3, 14 through 20 and 46 through 56 [R. 609-610].

Bernard Abrams testified[13] that he was the public accountant for Publisher's Outlet Store since it started

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[13]Abrams testified that Mr. Harvey Revo was president and was listed as an employee with a salary after his name [R. 649]. On cross-examination he testified that the boss at the present time was Mr. Harvey Revo and that before that it was Mr. John George and Mr. Harvey Revo and that he had never known appellant to be the owner or part owner. Justice Breslin pointed out that on Jan. 7, 1958, Revo's salary was $100 a week and appellant's salary was $175 a week and remarked, "And you say Revo was the real owner of the place, is that right?" [R. 652].

Abrams also testified that at the present time Mr. Revo's salary was $200 per week and appellant's was $200 per week [R. 651-652].

in 1957 and identified Exhibit 76 as the payroll book for the store.

Jay Dreher testified that he was a salesman for the Berkeley Publishing Corp. and that he visited the Publisher's Outlet about twice a month from March of 1959 to July of 1959. During this time he saw the appellant there about four to five times [R. 654]. He described his activities in the store.

On November 16, 1960, the Trial Court (Justices Gassman, Breslin and Galloway) denied appellant's motions to dismiss the information as to Counts 1 to 32 inclusive; 37 to 53 inclusive; 57 to 61 inclusive; 63 to 65 inclusive; 67 to 87 inclusive; 89 to 93 inclusive; 95 to 99 inclusive; 101 to 104 inclusive; 106 to 113 inclusive; 115 to 135 inclusive; 137 to 141 inclusive; 144 to 148 inclusive; 150 to 153 inclusive; 155 to 162 inclusive; 164 to 175 inclusive; 177 to 182 inclusive; 185 to 190 inclusive; 192, 193 and 196 to 198 inclusive and found the appellant guilty on each of the above counts. Appellant's motion to dismiss was granted as to Counts 66, 88, 100, 114, 136, 142, 149, 163, 176, 183, 184 and 194 and the appellant was acquitted on each of these counts [R. 699-700].[14] The Trial Court's opinion[15] appears at [R. 720].

The Supreme Court, Appellate Division, First Department[16] affirmed the Trial Court as to the findings on the obscenity counts, but held General Business Law §330, subdivision (2) unconstitutional and deleted from the judgment of conviction the following counts: 160

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[14]See notes 1 through 5, *supra*.

[15]The trial court's opinion is reported in *N. Y. v. Edward Mishkin*, 26 Misc. 2d 152 (Nov. 16, 1960).

[16]The Appellate Division opinion is reported in *N. Y. v. Edward Mishkin*, 17 A. 2d 243, 234 N.Y.S. 2d 342 (Nov. 27, 1962).

through 162, 164 through 175, 177 through 182, 185 through 190, 192, 193 and 196 through 198.[17]

The Court of Appeals of New York affirmed the judgment and order of the Appellate Division.[18]

Summary of Argument.

The record identifies appellant as a major producer of sado-masochistic pornography.

The essential character of appellant's books is to degrade sex. They are notorious examples of "dirt for dirt's sake." Lust is promoted and filth is portrayed.

The obscenity statutes are criminal in nature, trying the "conduct" of the actor. Appellant's activities are well with their ambit.

Amicus CDL contends that the judgment of the court below is correct in every respect and should be affirmed. We contend that:

I.

The words "sadistic" and "masochistic" are synonymous with the word "obscene" as those words are used in section 1141 of the Penal Law and were so construed by Prosecutor Stein and the Trial Court. "Obscene" is an "abstract" word whereas "sadistic" and "masochistic" are "concrete" or "specific" words.

II.

The Construction of Section 1141 of the Penal Law, adopted by the New York Conrt is binding on this Court.

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[17]See notes 1 through 5, *supra*.

[18]The Court of Appeals decision is reported in 15 N.Y. 2d 671, 255 N.Y. 2d 881 (Dec. 3, 1964).

III.

The test for "scienter" established in the Finkelstein case, "knowledge of the contents of the books" satisfies the constitutional requirements in *Smith v. California.* Appellant's activities do not place him in the coveted area of "honest mistake."

IV.

The sado-masochistic books are not "protected materials." They are "dirt for dirt's sake." Appellant's conduct in manufacturing them is criminal.

V.

Section 1141 of the Penal Law is not vague.

VI.

The book exhibits were not seized in violation of the First and the Fourteenth Amendments.

ARGUMENT.

I.

The Words "Sadistic" and Masochistic" Are Synonymous With the Word "Obscene" as Those Words Are Used in Section 1141 of the Penal Law and Were so Construed by Prosecutor Stein and the Trial Court.

The word "obscene" is an *abstract*[19] word, expressing a general quality, rather than a particular quality. Thus, as expressed by the Trial Court: "To be deemed obscene, it must show 'sexual impurity' and result in the exciting of *lustful and lecherous thoughts and desires,* or tend to stir sex impulses or to lead to sexually impure thoughts." (Our emphasis). The "lustful and lecherous thoughts and desires" referred to by the Court may relate to many classifications of sexual impurity, such as heterosexual, homosexual, lesbian, sadistic, masochistic, etc.

On the other hand the words "sadistic" and "masochistic" are *concrete*[20] words. The use of these words imparts a specific meaning to the type of obscenity proscribed.

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[19]An abstract word is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"2. of words, names etc. a. Expressing a quality apart from any object (honesty, whiteness) b. General, as opposed to particular (reptile) 3. Dealing with a subject in its theoretical consideration only. . . ."

[20]A concrete word is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"2. a. Naming a thing, or a class of things, as opposed to naming a quality or attributes; thus 'man' is a *concrete* term but 'human' is abstract. b. Having a specific application; particular, . . ."

In short, the words "sadistic" and "masochistic" are a specific type of obscenity and are synonymous[21] with that term.

Appellant misreads the prosecutor when he construes his statement:

> "Mr. Stein: Just one word by way of the kind of evidence we hope to adduce at the trial. I want to call the Court's attention that the *better number* of books involved here are not the normal types of volumes which are prosecuted in pornography cases. They fall within the specific provisions of 1141 dealing with sadism and masochism.
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> There are, in addition, a great quantity of books which fall within the normal provisions of the pornography section of the Penal Law." (Their emphasis).

to give a meaning to the words "sadism" and "masochism" different from "obscene". We construe the prosecutor to merely draw a distinction between the "abnormal" and "normal" sexual impurities, both of which are within the range of "obscene".

To interpret this statement otherwise is to disregard the prosecutor's remarks at the sentencing of the appellant [R. 711, 714]:

> "And the books your Honors have read, I need not dwell on their contents; they deal with the most vicious type of physical abuse in which human dignity is completely besmirched, all morality is done away with. This is the type material which this

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[21]Synonymous is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"1. One of two or more words of the same language having the same or nearly the same essential meaning. . . ."

defendant has indulged himself in for quite some time now. . . ."

"Mr. Mishkin has not only followed the pattern, but he has enlarged on it and revised it a great deal, and any of the earlier literature that deals with flagellation, sadism, and brutality, I think is perhaps overshadowed by the kind of works that this man turned out. I think, your Honors, that in order for the problem of the spread of *pornographic literature, particularly the sadistic and masochistic type,* to be finally dealt with firmly, would be to lay hands on this cancerous type growth which besets our city and remove it once and for all. . . ." (Our emphasis).

The Trial Court similarly construed the words "sadistic" and "masochistic" and "obscene" to be synonymous. At R. 722:

"Subdivision 1 of Section 1141 of the Penal Law provides in substance that 'a person who sells . . . or has in his possession with intent to sell . . . obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . is guilty of a misdemeanor.' That section uses the descriptive adjectives quoted above in addition to the objective 'obscene', and it was held that all of those adjectives are synonymous with 'obscene'. (People v. Brooklyn News Co., 12 Misc. 2, 768, 771)."

See also, *People on Complaint of Sumner v. Dial Press* (1944), 182 Misc. 416, 48 N.Y.S. 2d 480 in which the descriptive words of Section 1141, "obscene", "lewd", "lascivious", "filthy", "indecent" and "disgusting" were held to be synonymous (before "sadistic" and "masochistic" were a part of that section).

It is a *non sequitur* to say, as urged by appellant in his brief at page 7, that the testimony of the Commissioner of Police there quoted, in any way establishes that the pre-1956 Section 1141 of the Penal Law did not exclude sadism and masochism. The decision on the booklet "Nights of Horror" in the Kingsley Book case[22] is indisputable evidence to the contrary.

The words "sadistic" and "masochistic" are not superfluous (See Appellant's Brief, p. 8). As legislative mandates, they provide insurance against ineffectual action on the part of some Trial Court judges.

II.

The Construction of Section 1141 of the Penal Law, Adopted by the New York Court Is Binding on This Court.

The Trial Court in its opinion construed the words "sadistic" and "masochistic" to be synonymous with "obscene" [R. 722],[23] and the Appellate Division[24] and the Court of Appeals of New York[25] agreed.

The interpretation given, in appellant's case, to the adjectives which appear in section 1141 is consistent

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[22]See the opinion of Trial Judge Matthew M. Levy in *N. Y. v. Kingsley Books Inc., Louis Finkelstein, dba Times Book Store, et al.*, in 208 Misc. 150, 142 N.Y.S. 2d 735 at 741-743 (June 13, 1955), affirmed in *Kingsley Books Inc., et al. v. Brown*, 1 N.Y. 2d 177, 134 A. 2d 461, 151 N.Y.S. 2d 639 (Apr. 27, 1956), affirmed by the United States Supreme Court in 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 27, 1957). (Only Justices Warren, Harlan, Clark, Brennan, Black and Douglas of the 1957 court remain.) The word "obscene" as used in Section 22a of the Code of Criminal Procedure has the same meaning as the word "obscene" in Section 1141 of the Penal Law. *Tenney v. Liberty News Distributors Inc.*, 13 A. 2d 769, 215 N.Y.S. 2d 661 (May 29, 1961).

[23]See note 15, *supra.*

[24]See note 16, *supra.*

[25]See note 18, *supra.*

with prior decisions. *People on Complaint of Sumner v. Dial Press (supra); People v. Brooklyn News Co. (supra); Kingsley Book Inc. v. Brown (supra).*

The views of the court below, in respect to the above construction of the New York statute, are completely non-reviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court *must* accept the state court's construction and proceed to test the validity on that basis. *General Trust Company v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents,* 360 U.S. 684, 688.[26]

The appellant's reliance on *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) in this connection is misplaced. In *Lanzetta,* the Supreme Court noted that the statutory crime there involved was one unknown to the common law and that it was unconstitutional on its face because of vagueness and indefiniteness. The Court then went on to hold that higher courts could not *for the first time on appeal* render the statute clear and definite by interpretation and thereby sustain a conviction had prior to that interpretation. Here, the crime in question was one known to the common law,[27] and had been interpreted by the New York courts prior to the trial, and by the trial court itself prior to the conviction. Further, the trial court's interpretation was consistent

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[26]This Court said in *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688," we accept the premise that the motion picture here in question can be so characterized. We accept too, *as we must,* the construction of the New York Legislature's language which the Court of Appeals has put upon it . . ." (our emphasis).

[27]Curl's case, 2 Stra. 788 (1727).

with the higher court's interpretation, which did not occur in *Lanzetta.*[28]

The appellant in *N.Y. v. Finkelstein,* 9 N.Y. 2d 342, 174 N.E. 2d 470 (Mar. 30, 1961), having failed to prevail[29] with *Lanzetta,* it is difficult to see its application in this case.

III.

The "Scienter" Test, "Knowledge of the Contents of the Books", Established in the Finkelstein Case Satisfies the Constitutional Requirement in Smith v. California. Appellant's Activities Do Not Place Him in the Caveated Area of "Honest Mistake."

Except for the constitutional limitation expressed in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), the interpretation that a state court gives to the "MENS REA" requirement ("scienter") of an obscenity statute is binding upon this Court (see II).

The Court of Appeals of New York, in *N.Y. v. Finkelstein et al.,* 9 N.Y. 2d 342, 174 N.E. 2d 470 (Mar. 30, 1961) *interpreted* section 1141 of the Penal Law to re-

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[28]See *Lanzetta v. New Jersey* at p. 455, "The descriptions and illustrations used by the (trial) court to indicate the meaning of 'gang' are not sufficient to constitute definition, inclusive or exclusive . . . The latter interpretation (trial court's) would include some obviously not within the statute and would exclude some plainly covered by it. . . ."

[29]At the time of the prosecution in *Finkelstein,* Section 1141 of the Penal Law had been interpreted by the prevailing precedent, an appellate department decision, not to require "scienter." The trial judge however, interpreted the statute to require "scienter." The Court of Appeal agreed with the trial court's interpretation. Writ of Certiorari was denied by the U.S. Supreme Court. (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

quire "scienter", thus obviating the infirmity of the *Smith* case. The court there said at page 471:

> "A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished . . ."

The "scienter" requirement was further defined by the Court of Appeals in *N.Y. v. Finkelstein,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367, when the same case came back on appeal a second time, to mean "knowledge of the contents". At page 304, the Court said:

> "Both defendants presently contend that the proof fails to establish *scienter.* In our opinion, however, *scienter—'knowledge* by * * * [defendants] *of the contents of the book*[s]' (Smith v. California, 361 U.S. 147, 149, 80 S.Ct. 215, 216, 4 L.Ed.2d 205)—was sufficiently proven beyond a reasonable doubt. As the Supreme Court of the United States said in Smith v. California, supra, p. 154, 80 S. Ct. p. 219: 'Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.' The voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the covers, the $5 selling price boldly stamped on the front cover of each paper-covered book, taken together, warranted the trial court's conclusion that *scienter* was established beyond a reasonable doubt" (our emphasis).

The overwhelming weight of evidence in this case was that the appellant was the publisher and as such, *had knowledge of the contents of the material.* Under the facts of appellant's case, it is beyond question that, under New York law, the Court of Appeals was correct in affirming the trial court's finding that the "scienter" requirement had been proved.

Appellant's attack in Point IV of his brief is on the New York interpretation rendered in *N.Y. v. Finkelstein,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367. He says, in effect, assuming appellant had "knowledge of the contents," that is not enough for a *Prima Facie* case (our emphasis).

At page 13 of Appellant's brief, appellant argues:

> "From Smith v. Calif., 361 US 147, is to be learned that a defendant not only must know the contents of the book, but must know that they are of the character proscribed. In other words, it must be shown that the defendant had made an evaluation judgment concerning the books . . ."

Such an interpretation misreads the *Smith* decision. Appellant has extracted wording out of context to support his hypothesis, and has totally disregarded the express holding in the *Smith* case.

Appellant's argument flies in the face of the *Finkelstein* case (*supra*). There, retailers of the very material which appellant was publishing (Queen Bee) were convicted on *circumstantial evidence* that they had "knowledge of the contents." This Court denied certiorari in the *Finkelstein* case. The People in appellant's case presented *direct evidence* that Mishkin had knowledge of the contents.

This Court did not make *subjective* knowledge a constitutional requirement in the *Smith* case. At page 154 the court said:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents* or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard Law Review 1. Cf. American Communications Association v. Douds, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial" (our emphasis).

It is clear from the above language that, with one exception, the Court was not considering "scienter" in the narrow terms of the seller's subjective knowledge that the matter was obscene. What the Court was saying was that if: (1) the material is, in fact, obscene and (2) the seller has knowledge, or is aware of the contents or nature of the material, then a *prima facie* case for "scienter" has been established to permit the matter to go to the jury.

The Court did however leave a small area undecided —whether the defense of "honest mistake" in certain

cases might be essential as a matter of constitutional principle, at page 155:

> "We need not and most definitely do not pass today on . . . whether honest mistake as to whether its contents in fact constituted obscenity need be an *excuse*. . ." (Our emphasis).

In voicing this caveat, a question has been raised as to the force of *Rosen v. U.S.*, 161 U.S. 606 (1896), the long standing Supreme Court authority in this area.[30]

The *Rosen* case made subjective knowledge of obscenity completely irrelevant. There the defendant was convicted under a federal statute which made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant *knew* that the matter was obscene. On appeal, the U. S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the

[30]Any doubt that the *Rosen* case is still the law on this point should have been dispelled by the approval given to this citation in *Roth v. U. S.*, 354 U.S. 476, 491 at footnote 28.

> opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious."

The *Rosen* case, was, in short, a public policy statement by that High Court that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in *Nash v. U.S.*, 229 U.S. 373, 377, cited in *Tyomies Publishing Co. v. U.S.*, 211 Fed. 385:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death. . . ."

The facts in appellant's case, however, do not call for a reevaluation of the *Rosen* statement of the law.

In this regard, consider the "state of mind" spectrum where "knowledge" is concerned, as applied to a person who has sold a book which is obscene as a matter of fact. Degrees of guilt are listed in inverse order:

(1) He may have been aware of the fact the material was obscene from personal observation.

(2) He may have believed the fact the material was obscene.

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge).

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (criminal negligence).

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (honest mistake).

It is to situation (5) above that the majority opinion raised a *caveat*. By no stretch of the imagination do appellant's activities place him in the category of "honest mistake."

Further, appellant's argument is directed against the requirements for a *prima facie* case (appellant did not testify). The cases in this area as to which this Court has denied certiorari are a complete answer to appellant's assertion. *U.S. v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960), cert. denied 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960), rehearing denied 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960); *U.S. v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), cert. denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct 23, 1961), rehearing de-

nied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961); *Harold S. Kahm v. U.S.,* 300 F. 2d 78 (Feb. 9, 1962), cert. denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *New York v. Finkelstein* (*supra*); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961). See also *Conn. v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (Nov. 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (Dec. 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* .... Ill. ...., 204 N.E. 2d 768 (Jan. 21, 1965); *Missouri v. Vollmar,* .... Mo. ...., 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* 3 Ohio App. 2d 90 (April 5, 1965).

IV.

The Sado-Masochistic Books Are Not "Protected Materials." They Promote Lust and Portray Filth for Its Own Sake. They Are "Dirt for Dirt's Sake." Appellant's Conduct in Disseminating Them Is Criminal.

The essential character of Mishkin's books is to degrade sex. In his opinion, Justice Gassman eloquently stated the case in the Trial Court against the materials and conduct of the actors in this drama:

> "In writing the books before us, the respective authors made 'no attempt to point to any lesson that might be of value to any one that would read

them. It was just a clear attempt to portray filthy ideas.' (*People v. Pesky,* 230 App. Div. 200, 202).

They lack literary merit. They teach no lesson and point no moral. The authors of these books have not become distinguished by their place in the literary world nor by the quality of their style of writing. They wrote these books on order from the defendant. One of them, in signing a contract for the sale of two of his manuscripts to the defendant (People's Exhibit 74) stipulated therein that his name should not appear as the author of the books. Another testified that the defendant wanted her to write a book full of sex scenes—'women making love to women, sodomy, lesbian scenes, spankings'. She testified that she never wrote any book on these subjects before and that defendant gave her some books he had to aid her in her research. A third, who wrote a large number of these books at defendant's request, testified that in one instance, defendant gave him a book and asked him to expand on it; that defendant told him he wanted 'wheels on female bodies and the darkening of flesh under flaggellation.' These books deal with sex in its most corrupt, sadistic, masochistic and degenerate form. They promote lust and portray filth for its own sake, or as Judge Woolsey called it in the *Ulysses* case (5 Fed. Sup. 182, 184), 'dirt for dirt's sake'.

The language of the Court of Appeals in *People v. Pesky,* 230 App. Div. 200, at page 204, is quite appropriate to the situation before us. The court there said: 'These matters must be judged by normal people and not by the abnormal. Con-

ditions would be deplorable if abnormal people were permitted to regulate such matters. Of course, there are some people who seem to be unable to find anything obscene in anything written. It is very clear that the author of the book now before us for consideration was not thinking of the spiritual, but devoted the whole book to the animal instincts of the human race. His efforts were not a lesson in morality, nor an attempt to uplift the mind of the reader. * * * While some people may think this quite smart, a book of this kind, which has nothing to recommend it, and dealing only with such details, is properly held to be disgusting, indecent and obscene.' "

The "psychology" of appellant's materials[31] comes through very clearly upon close analysis. See here, the book outline of Exhibit 3, entitled "The Female Sultan" appearing in Appendix A. The circumstances surrounding the creation of "Female Sultan" appear at note 9.

This Court has heretofore passed upon the merits of Exhibit 72, entitled Queen Bee[32] and the conduct of Finkelstein, one of its retailers. If there is any difference, it is that the conduct of appellant is more culpable; the product is the same.

The State Courts of New York have heretofore expressed a strong public policy against sado-masochistic obscene materials. *Kingsley Book Inc. v. Brown* (*supra*) ("Nights of Horror"); *N.Y. v. Finkelstein et al.* (*supra*) ("Queen Bee", "Garden of Evil"); *People v. Hay et al.*, 245 N.Y.S. 2d 705 (Dec. 3, 1963) and

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[31]See note 11.

[32]See note 4.

Peopie v. Hay, 258 N.Y.S. 2d 238 (March 18, 1965); ("Betty Page in Bondage", "Ruthless Treatment of Bound Slaves", "Bondage Fight"). It would be a distortion of the "Community Standards" principle to say that a state must accept such materials.

Although both the *Finkelstein* and the *Mishkin* cases were decided by a court without a jury, sophisticated juries elsewhere have expressed the same view regarding the nature of his product.[33]

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[33]In *U.S. v. Walter F. Wissman and Leon A. Grant, Docket 29023,* a Los Angeles Federal Grand Jury indicted two disseminators in six counts for the distribution and advertising of "Swish Bottom", "Screaming Flesh" and "The Holdout" 18 U.S.C. 1461. A jury found both defendant guilty on all six counts on January 10, 1962. "Swish Bottom" appears as Exhibit 29 and "Screaming Flesh" as Exhibit 21 and 57. Although an appeal has been filed with the Circuit Court of Appeal for the Ninth Circuit, Docket 17865, no action has been taken on the appeal. The jury in *U.S. v. Klaw, infra,* note 35; is representative of what *any* jury in the United States would do with sado-masochistic obscenity. They recognize what Judge Moore could not see in the *Klaw* case in the "smoke" of the high court's opinions—material, whose essential character is to debase sex, is *totally* unacceptable in the modern American community today. Compare Judge Moore's obscenity opinion in *U.S. v. Darnell,* 316 F. 2d 813, 818 in an earlier year 1963:

> "In New York the courts have been kept busy with the same problem. As might be expected, there are situations clearly within the statute and clearly without and, of course, the troublesome borderline case. The decisions, however, should be quite helpful in reaching the correct result here. On the one hand, there are the cases in which the magazine and letters sold surreptitiously to the public *are designed solely to appeal to "prurient interest." They are* the standard sado-masochistic, bound, gagged and tortured type with grossly exaggerated drawings, including all the usual fetishes and stories appealing only to a cult (if such exists) of (by normal standards) perverts.[9] . . .
>
> [9]In this group are the materials before the courts in *Peo. v. Zucker . . . Peo. v. Mishkin . . . Peo. v. Fried . . . Peo. v. Finkelstein . . .*" (ours emphasis.)

Then, the Judge thought that the books etc. in *Zucker* and *Mishkin,* College for Sinners and Sex Cat in *Fried,* and Garden of Evil and Queen Bee in *Finkelstein* were "obviously written to arouse prurient interest."

The choice of a court trial apparently was Mishkins. While a jury trial may not be had on a misdemeanor in the Courts of Special Sessions in the City of New York, the practice is to make a request for a jury trial in an obscenity case reasonable cause for removal to a court, where a jury trial may be had. See Criminal Procedure in New York, Paperno and Goldstein at page 745. *People v. Goldman,* 197 Misc. 290, 94 N.Y.S. 2d 535; *People v. Morganstern,* 134 Misc. 127, 234 N.Y.S. 2d 11; *People v. Herk,* 44 N.Y.S. 2d 444.

To understand what the United States Supreme Court considers to be proscribable material and criminal conduct in this area, one should logically start with the *Roth-Alberts* cases, 354 U.S. 476, both of which were criminal prosecutions, and the concurring opinions of Justices Harlan and Warren. Both Justices in that case felt that the subject matter should be reviewed (in the *Alberts* case, the subject matter was sado-masochistic and ordinary nude photos—commercial obscenity. See 45 Minnesota Law Review 5, 24 footnote 102), and after review, found the matter to be within the area of a jury question. Those Justices were looking at commercial obscenity—the same subject matter we are concerned with in this criminal appeal. Justice Warren said at page 1513:

> "The defendants in both these cases were engaged in the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."

In obscenity cases as in criminal cases in general, the defendant's conduct is the central issue. As stated by Chief Justice Warren in his concurring opinion in *Roth v. U.S.*, 345 U.S. 476, 494:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

See also Chief Justice Warren's opinions in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, ..., L. ed. 2d 1469, 1476 (1957), and *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1673, 1685 (1964).

The same principle is very well stated by the Supreme Court of Errors of Connecticut in *Connecticut v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (Dec. 24, 1958):

> "Obscene and indecent are not technical terms of law and hence susceptible of fine distinctions. Whether something is obscene or indecent depends upon all of the surrounding circumstances. Section 8567 comprehends material which from its very character a person of sound mind must know was obscene and indecent. See Wigmore, Evidence (third edition) page 43. It also includes material which by the method of its presentation to the prospective reader or viewer shows a design to appeal to sordid interests. See Roth v. U.S., supra, 354 U.S. 495, 77 S.Ct. 1314 (concurring

> opinion). To cite an example; if language and pictures describing or portraying human sex organs are contained in a book or brochure on medical science and treat the subject with no more frankness than is required, they would not be obscene or indecent within the statute. But if the same language and pictures were taken from their context and compiled in pamphlet form to be sold or shown to children, they would be. People v. Muller, 96 N.Y. 408, 413. The purpose of the statute is to prevent the selling, showing or offering of obscene or indecent material falling within the description stated."

See also the expression of the Supreme Court of Errors of Connecticut to the same effect in *State v. Andrews,* 186 A. 2d 546 at page 550.

The reporter's comments on the American Law Institute, Model Penal Code, 1957 draft (section 207.10) is to the same effect, at page 13:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain could be eliminated, the supply would be cut off at the source. . . ."

Much has been said regarding the difficulty encountered in the Supreme Court in affirming obscenity *convictions* in recent years. Those commentators, however, have failed to note a very basic distinction. The cases (with one exception) involved *civil judgments* in "*prior restraint*" cases.

When the obscenity statutes have been applied as criminal statutes trying "conduct", the peoples' case

has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio*, 378 U. S. 184, 84 S. Ct. 1674. See:

Roth-Alberts v. California, 354 U.S. 476 (June 24, 1957);

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 276 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961), rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961); *Roy A. Oakley v. U.S.* (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari). 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962); see note 4 herein.

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in appellant's case, writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named) 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, III, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "SexCat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 24 Cal. Rptr. 734, writ of certiorari denied (Justice Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, ... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

The thread which runs through all of the above cases[34] is the culpable "conduct" of the defendant. As

[34]While it is said, in general, that the denial of a petition for certiorari means "nothing" or "nothing much", is this argument

an example, while the film was not before this Court in the *Wenzler* case *(supra)*, the transcript of the trial was. The conversation between the police officer and employer Imlay made it crystal clear that the movie being purchased was not a home movie for family consumption.

A criminal statute, holding a person criminally liable for "conduct" *after* the voluntary act, is to be *distinguished* from other methods of obscenity proscription such as search warrant proceedings, censorship boards, licensing procedures, etc., which aim at destruction of the material or keeping the material off the market and which by their nature are subject to attacks on Constitutional grounds as invoking "prior restraint" upon free speech, press, etc. The destruction between the two insofar as free speech is concerned is that, while speech is "free", a person may be held accountable for the abuse thereof.

Where "prior restraint" is not an issue, the people's cause has entertained little difficulty. Where defeat has been met, it has been exclusively in the area of "prior restraint".

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), voiced an opinion that the United States Supreme Court is not defending obscenity, but that it only *appears*[35] to do so

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valid, if our judicial reasoning is committed to the "Constitutional Judgment" principle in obscenity cases? See *Supreme Court Practices, Third Edition Stein and Grossman at pp. 182-183.* Must these 22 cases remain as anonymous statistics, and only the reversals be given publicity? At least one State Supreme Court has used them to advantage. See *Conn. v. Andrews,* 150 Conn. 92, 186 A. 2d, 546 (1962).

[35]It is our opinion that the High Court has failed to hit the mark in its obscenity opinions. The opinion of Justice Moore in *U.S. v.*

when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do—for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

The "procedurally bad cases" referred to by Justice Warren were cases involving "prior restraint". Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and postmaster cases) and mass seizures under search warrants, aimed at destruction of

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Klaw, included in appellants brief at Appendix B (decided July 15, 1965) is typical of the misunderstanding which has been engendered. The result reached in *Klaw* is the direct opposite of the results reached in *Roth-Alberts*, which dealt with similar materials. If Roth and Alberts were not pornographers, why was the verdict left standing? That Judge Moore should reverse the jury's verdict, holding Nutrix' sado-masochistic materials to be obscene, is a reversal of common law principles which hold the jury to be the embodiment of community standards. It is representative of the chaotic results flowing from the High Court's handling of obscenity cases. See in this regard Justice Shapiro's opinion in *N.Y. v. Birch, et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) and Judge Sprankle's opinion in *Calif. v. Milton Luros, et al., Superior Court* case 295,183, reported in the Los Angeles Daily Journal Report Section Part 3, page 14. The "appearance" that the court is "sponsoring" obscenity is inadvertently becoming an actuality through a "follow the leader, without understanding" action on the part of the lower courts. The solution, in our opinion, lies in the critical comment of *40 Notre Dame Lawyer 1*, (Dec. 1964).

the material only. An examination of the cases underscores this point of distinction.

Th*e* *Roth* decision was less than six months old when four "prior restraint" cases reached the United States Supreme Court. In two, the Postmaster refused to accept material for deposit in the mails; in one, a censorship board denied a license to a movie and in the last, the custom's officials refused to permit entry of certain materials into the United States. In each instance, law enforcement chose "prior restraint" methods in preference to trying the criminal conduct of the individual, as in the *Roth* case. In December 1957, and January 1958, the United States Supreme Court reversed all four lower court judgments *but without stating why,* other than to cite *Roth* in the three federal cases and *Alberts* in the state case. But what expression of law in *Roth-Alberts* was applicable? Both of those were criminal cases.

Although both "obscenity" and "prior restraint" were present and the cases could have been decided on either issue, most commentators assumed the high court decided the obscenity issue "sub silentio", for the high court did not send the matter back for further treatment. Few considered the possibility that the high court might penalize law enforcement for procedural defects where "prior restraint" was employed. To release obscene material would be akin to giving scandal by "implying" approval, and previous policy had never undertaken that risk. Later "prior restraint" cases which were accompanied by written opinions were to prove this reasoning to be in error. The court has applied judicial blinders in certain cases.

In *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708 (June 19, 1961), a unanimous Supreme Court reversed a Missouri judgment that 100 items were obscene. In this prior restraint case however the high court *explained its reason with an opinion.* The administrative procedures employed in executing search warrants were deficient. The United States Supreme Court explicitly stated that it *would not consider* the obscenity issue under these circumstances (defect in "prior restraint" procedures).

In *Manual Enterprises, Inc. v. Day,*[36] 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432 (June 25, 1962), illustrating the pitfalls of faulty procedure, three Justices explicitly stated, in casting their vote for reversal, that the Postmaster did not have the power under the statute to exclude three magazines from the mails on his own determination that the magazines were aimed at homosexuals and were obscene. Yet one year earlier the United States Supreme Court had unanimously refused to review a criminal conviction involving the president of the same company, Herman L. Womack, who had himself been prosecuted criminally for distributing the same type of material.

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[36]Appellant's citation of the *Manual Enterprises* case at page 16 and 19 of his brief attempts to convey the idea that material aimed at the prurient interest of sex deviates is protected matter, under that case. The contention completely misses the significance of Justice Harlan's opinion in the *Manual Enterprises* case. If we understand Justice Harlan's viewpoint correctly, he would not apply that reasoning (which was the opinion of two judges only, and was not the "opinion of the Court") to the *Mishkin* case, which is a *state case.* We would hope that Justice Harlan, who by no means is a defender of obscenity, would clearly assert this proposition, to counter the harm which is being done in state courts through misconstruction. Better still, that he would abandon the federal-state distinction and retain his attitude in *Jacobellis v. Ohio* and *A Quantity of Books v. Kansas,* 84 S. Ct. 1723.

In *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964), a similar result was reached in another "prior restraint" case in which the Kansas Supreme Court had held that 1715 copies of 31 Nightstand paperback books were obscene. The reversals were on the same grounds. The procedures employed in executing the search warrants were deficient. At least four Justices thought so, which when added to the votes of Justices Black and Douglas were sufficient for reversal. These four Justices explicitly stated, "We do not reach, and intimate no view upon the appellant's contention that the Kansas courts erred in holding that the novels are obscene. . . ."

More recently, the high court had before it in 1965 two movie cases and this same issue of prior restraint—the movie censor board. *Freeman v. Maryland,* October Term 1964, No. 69 and *Trans-Lux Distributing Corporation v. Board of Regents of New York,* October Term 1964, No. 314. The *Maryland* case dealt with an innocuous film, as to which there was no claim of obscenity whatsoever. To test the statute, Freeman refused to apply to the Maryland censor board for a license. When he exhibited the film, he was convicted of failing to apply for a license. On the other hand, in the *Trans-Lux* case, the New York Court of Appeals had affirmed the Board of Regents' denial of a license to the foreign film, "A Stranger Knocks" because of its obscene portrayals, requiring that certain cuts be made. One of these was an extremely erotic portrayal of the sex act and orgasm (with music) of the female lead from her position astride a male, lying on a couch. The court heard arguments and reversed the *Freeman* case, holding the Maryland procedure bad for placing on the ex-

hibitor (rather than the State) the burden of initiating the court action to prove the right to a license. In the *Trans-Lux* case the high court did not hear argument but instead, reversed on the grounds of the *Freeman* case, once again applying "blinders" on the ultimate issue of obscenity.

Common to the adverse results in 1958, 1961, 1962, 1964 and 1965 was the "prior restraint" issue. The high court, in its written opinions made it clear that, obscene or not, the material would be turned free if the prior restraint procedures did not meet their new emerging standards.

The obscenity statute under which the State of New York has proceeded however, is a *criminal* statute holding the appellant criminally liable for his "conduct" in publishing obscene materials. He has been charged with and convicted of engaging "in the commercial exploitation of the morbid and shameful craving for materials with prurient effect." (See Chief Justice Warren's opinion in *Roth-Alberts, supra*). The case at issue is not a "prior restraint" case.

Appellant disregards the *function* of the obscenity statutes when he argues in his brief at page 18

> "whatever high intellectual level these books lack, cannot serve to deprive persons who may find interest in them. And the converse is obvious, that those persons who do not wish to read them can refrain from doing so . . ."

Community standards influence private morality. Where factors adverse to good public morality flood the community, the moral fiber of the citizen is subjected to eroding forces. The obscenity statutes *function* to main-

tain high standards of moral conduct. They are *criminal statutes* directed against the conduct of those individuals who unleash the forces of erosion.

His proposition that those who do not wish to read them "can refrain from doing so." flies in the face of this Court's instruction in *Roth-Alberts,* 354 U.S. 476 that there is a community conscience which considers *everyone:*

> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, *but upon all those whom it is likely to reach.* In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards." (our emphasis).

If appellant's proposition were to prevail, there would be no obscenity laws.

When the attack was made by the two commercial pornographers Roth and Alberts in 1957, this court stood its ground and affirmed what had always been the American tradition. Matter whose dominant purpose was to excite lustful thoughts was utterly without redeeming social importance and could be proscribed by state and federal law.

Justice Learned Hand, father of the modern law on obscenity, pointed out in *"The Bill of Rights"* at page

63, the Roth decision recognized that "it had been the long-established habit of most societies to suppress language likely to arouse lewd emotions; and that this might be a lawfully protected interest regardless of any conduct that would result." The decision said no more than what our courts have recognized for the previous 150 years.

The function of the obscenity laws is not, as is often suggested by those opposed to obscenity laws, the eradication of that social evil which directly results in anti-social conduct, nor even that social evil which "probably" or "possibly" is the cause of such anti-social conduct. Although, in fact, anti-social conduct[37] is known to follow (to what extent is not known) the validity of the obscenity laws does not depend upon such a result being reached in individual cases. Neither does it concern itself with the danger that children may come into contact with the material. Rather the laws' concern is with the more general accepted historical notion, that a society in which obscene material is readily available for its members is not a healthy society and is heading downhill.

Several hundred years ago a poet wrote in simple verse what we consider to be the clearest statement of "why" government acts to outlaw obscenity. In 1705, Alexander Pope wrote in his quatrain on "The Monster Vice":

> Vice is a monster of so frightful mien
> As to be hated, needed to be seen
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.

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[37]Recommended reading for those who see no anti-social significance in sado-masochistic materials, see *California v. Glatman*, 340 P. 2d, 8 (June 5, 1959). The sexual significance of the bondage photograph is in the mind of the sex deviates. Read *Glatman* and then review the materials, again.

Justice Fox of the District Court of Appeal of California expressed it as follows in *California v. Williamson*, 207 Cal. App. 2d 839 (Sept. 26, 1962), writ of certiorari denied 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964).

> "The effect of such 'literature' is to dull the moral sensitivity of many, if not most, of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior.'"

The existence of obscenity is the symptom of a disorder which probability teaches us, will lead to ruin. Arnold Toynbee, the historian, tell us that 19 of the 21 great civilizations which flourished in world history, crumbled into ruin—not because of armed aggression from without, but because of moral decay from within.

Being a nation that takes stock in representative sampling, we seek to assure a healthy future by capitalizing on the experience of the past.

An examination of man's historical experience with the sexual urge lends credence to the adage, "There is nothing new under the sun."

A nation which is preoccupied with sex is thought to be "sick". The ultimate evil would be a society in

which sex pictures, novels, and magazines, are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery and sex language in every dialogue. To the extent that we approach this status by degrees, we recognize we are closing the gap on the community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.

In sum, the case for the governmental action taken by the State of New York, and against appellant's proposition was stated by U.S. Supreme Court Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*) at p. 502:

> "The State can reasonably draw the inference that over a long period of time the indiscrimnate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards . . ."

V.

Section 1141 of the Penal Law Is Not Vague.

Appellant asserts at page 18 of his brief:

> "The guessing at what the law permits and what it forbids has resulted in a three year prison sentence and a $12,000 fine imposed on Mishkin. It is less than justice to impose such penalties because the guess was wrong at a law that is not clear to anyone . . ."

The complete legal answer to this was given by the United States Supreme Court in *Roth-Alberts (supra)*,

at 491, footnote 28 when the same claim was made there:

> " 'Everyone . . . must take notice of what, in this enlightened age, is meant by decency, purety and chastity in social life, and what must be deemed obscene, lewd, and lascivious.' Rosen v. U.S. 161 U.S. 29, 42."

See also *Nash v. U.S.* and *Tyomies Publishing Co. v. U.S.*, at Point III (*supra*). As noted in Point III, appellant's mistake (if such it was) was not an "honest one".

An emotional answer is found in the remarks of Prosecutor Stein at the sentencing of appellant, quoted at Point I (*supra*).

VI.

The Book Exhibits Were Not Seized in Violation of the First and the Fourth Amendments.

A. Appellant Waived the Production of Officer Dimler for Examination as to the Adequacy of the Search Warrant.

Although book exhibits had been obtained at five locations: Publisher's Outlet, Midget Book Store, 37 West 20th Street, Police Files and Main Stem Book Store (see notes 1-5), at only one of these was a search warrant employed. The search warrant was issued for 37 West 20th Street.

Although multiple copies of 42 titles were taken from 37 West 20th Street, only a *single copy* of each of the 42 titles was admitted into evidence [R. 132]. The single objection made to the admission of Exhibits 1-42 was made at R. 136 when appellant's counsel said "Well, this is all, then, subject to my examination of

Lt. Dimler. It was *not* made as a formal objection and the Judge indicated he had a right to inquire—but the appellant's counsel did not thereafter press his right to inquire.

The only other objection by appellant to the admissibility of the book exhibits appears at R. 154, but that was as to the seizures which occurred at the other three locations of the Publishers Outlet, Midget Book Store and Main Stem Book Store. Those seizures were incident to lawful arrests and were made without search warrants. This objection did not relate to 37 West 20th Street.

Counsel did not thereafter ask to examine Dimler, nor did he voice any objections when exhibits 1-42 were thereafter, offered into evidence, nor did he voice any objection at the time he made his motions to dismiss [R. 674].

A reason for counsel's lack of enthusiasm on this issue is suggested in his arguments on the motion to dismiss. The charge was "possession with intent to sell" Counsel's strategy was that appellant held no possessory interest in the basement. At page 675, he argued "The evidence is beyond dispute that this defendant *had no connection whatever with that basement*" (our emphasis).

Whether the *Mapp v. Ohio* exclusionary rule is retroactive has been the subject of many decisions. In New York, it has been held that, in appeals from previous convictions reaching the appellate tribunal in the ordinary course, the *Mapp* rule must be applied. *People v. Loria*, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462, 179 N.E. 2d 478. The Court of Appeals remitted the *Loria* matter to the Trial Court for a hearing.

A prerequisite to the above, however, is a showing that the objection had been raised on the pre-Mapp trial, even if by general, rather than specific, objection. *People v. O'Neill,* 11 N.Y. 2d 148, 227 N.Y.S. 2d 416, 182 N.E. 2d 95; *People v. Coffey,* 11 N.Y. 2d 142, 227 N.Y.S. 2d 412, 182 N.E. 2d 92; *People v. Yarmosk,* 11 N.Y.S. 2d 397, 230 N.Y.S. 2d 185; *People v. Wade,* 12 N.Y. 2d 61, 236 N.Y.S. 2d 36, 187 N.E. 2d 111.

The facts set forth above indicate that the appellant did not, in fact, raise a legal objection by his statement, appearing at R. 132.

When counsel for defendant voiced "no objection" to the admission of evidence allegedly obtained contrary to the principles enumerated by the United States Supreme Court in *Mapp v. Ohio,* no question of law was presented for review by any appellate court. *People v. West,* 12 N.Y. 2d 1090, 230 N.Y.S 2d 159.

B. Norman Levenberg, the Printer Was in Possession of the Books at 37 West 20th Street and Consented to the Search.

The United States Supreme Court has clearly indicated that the rights afforded by the Fourth and Fifth Amendments may be waived. *Zap v. U.S.,* 328 U.S. 624. This rule also applies in New York. See *People v. Kalnin,* 189 N.Y.S. 359 wherein the court held that certain defendants consented to the search of their home.

The right of one person to consent to the search of another's property derives from the authority, apparent or implied, of the one consenting. *Hook v. State,* 15 Misc. 2d 672, 181 N.Y.S. 2d 621. One having the joint use or occupancy of the premises may so consent.

Duskill v. U.S., 281 Fed. 146. See also *In re Lessard*, 62 Cal. 2d, ... 42 Cal. Rptr. 583, 399 P. 2d 39 (1965).

At the trial, appellant did not contest Levenberg's control of the basement premises at 37 West 20th Street. Levenberg testified that the police told him they were coming [R. 302]; that he had told them to pick up the books when he decided to cooperate [R. 339]; that he was there when the police arrived [R. 301]. He also testified that he put the books in the basement [R. 188] and that this was his idea [R. 371]. He had a financial interest in his "storage", having paid out 600 or 700 dollars and gotten back only a couple of hundred from appellant [R. 367]. He testified he was in control of the warehouse [R. 279].

The testimony is uncontroverted, Levenberg had complete control of the basement and consented to their coming on to the premises for the search of the premises.

At the very least, the offices had a right to take one copy of each of the book present, since Levenberg had told them to "pick up the books".

The Statement of Facts herein indicate an entirely different investigation and procedure than was exhibited in *Marcus, Mapp* or the *Kansas* case. Those cases are not in point.

C. The Seizures From the Publisher's Outlet, Midget Book Store and Main Stem Book Store Were Incident to a Lawful Arrest and Were Not Dependent Upon the Procurement of a Search Warrant.

The record indicates a seizure of contraband incident to a lawful arrest upon sufficient cause in a place open

to public access (See first five paragraphs of Statement of the Case). No search warrant was necessary under these facts. *New York v. Matherson,* 16 N.Y. 2d 509 (April 22, 1965); *New York v. Peskin,* 16 N.Y. 2d 511 (April 22, 1965).

D. Counts 110 and 159 Are Not Involved in the Search and Seizure Issue.

At page 23 of appellant's brief, Exhibit 72 is listed, in error, as within the search and seizure issue. That exhibit, "Queen Bee" was not taken from appellant's possession.

The 21 copies of "Queen Bee" were seized as contraband at the time that the 22nd copy was purchased by a New York detective. See paragraph 4 of the Statement of the Case. Their admissibility is beyond question *N.Y. v. Finkelstein,* 28 Misc. 2d 771, 218 N.Y.S. 2d 341, *N.Y. v. Matherson (supra); N.Y. v. Peskin (supra).*

Counts 110 and 159, naming "Queen Bee" are not involved in the search and seizure issue.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amicus Curiae.

APPENDIX A.

The Female Sultan.

by Stan Drees.

Limited edition
Fully illustrated
18 chapters, 153 pages
Price: $10.00

CHARACTERS:

Letica Vale. . . . 20 years old

Velma Corley. . . . physical instructor at Mrs. Finegan's School of girls

Dr. Grant Hurd. . . . physician at girl's school

Mlle. Yvonne Gaubert. . . . French teacher at Hunter College

Roger Smythe. . . . 26 years old, ex-Marine sergeant

Wilma Innes. . . . student at Mrs. Finegan's School

Walter Snyder. . . . Book publisher

James Cousins

Rodney Wilson

Pauline

Janet Surley. . . . student at girl's school

Evelny Hurd. . . . dean of women at girl's school

Gerald. . . . 15 year old boy

CHAPTER ONE. (pp. 3 to 8)

Letica Vale, 20 years old, lives with her Uncle and Aunt and their five sons in Dakar, South Africa. She stands nude in front of a mirror, admiring her beautiful body, "the faint sweat of desire and abandon break out over her body." (p. 4) She hates her uncle, and his sons, in fact she hates men. When her uncle dies, the

family moves back to the States, and Letica is sent to Mrs. Finegan's School for Fashionable Young Ladies.

CHAPTER TWO. (pp. 10 to 19)

Dr. Grant Hurd gives a physical examination to the girls at Mrs. Finegan's School. Velma Corley, the physical education instructor, particularly notes Letica's beautiful body. To Dr. Hurd, the examination is strictly a job.

CHAPTER THREE. (pp. 20 to 26)

Velma Corley, a lesbian, when she was a student at Hunter College, fell in love with the French teacher, Mlle. Yvonne Gaubert. They were lovers, "All at once Yvonne moaned and shivered. She changed position. Velma felt an unspeakable thrill. Hitherto unknown to her . . . a new apex of delight. She had kissed a women's lips before, yes, and her breasts, and even her eyes and the lobes of her ears. But this she had never dreamed of. (cunnilingus) p. 26. When she first saw Letica, she felt no power on earth could keep her from seducing the girl.

CHAPTER FOUR. (pp. 27 to 44)

Letica is aware of Velma Corley's lesbianism, "considering the fact that everytime she was in Miss Velma's presence the woman did nothing but look at her with hot eyes." (p. 27) "Letica was a virgin, but wanted a man first before she was sidetracked 'on that branch' of passion's offbeat highway." (p. 28) One night, Letica sneaks off campus, and goes to a roadhouse nearby that is off limits for all students at Mrs. Finegan's School. Pages 32 to 34 describe Letica having intercourse with Roger Smythe, 26 years old and an ex-

Marine sergeant. He is amazed to find that Letica is a virgin. He wants her to marry him even though he doesn't even know her name. Letica thinks what bliss she would get from smashing a whip against the 'writhing naked flesh of some other human being." (p. 33) She promises to meet Roger the next night.

CHAPTER FIVE. (pp. 36 to 44)

Velma Corley keeps thinking of Letica's lovely lush body. Pages 39 to 44 describe Velma seducing Wilma Innes, a young student at the school. She was wishing all the time it was Letica. Wilma spent each night in bed with Velma. "Velma found that Wilma would let her do anything she wished." (p. 43)

CHAPTER FIVE. (should be chapt. 6, pp. 45 to 54)

Letica meets Walter Snyder, a book publisher at a local restaurant. She has written a book, and Walter tells her if she will come to his apartment he will buy her book. Pages 49 to 53 describe them nude in his bedroom, while Letica beats him with his belt. "Here", he said, reaching her the heavy, leather belt, "take this, and beat the living crap out of me." (p. 50) After beating him until the blood flows, they have intercourse. (p. 52)

CHAPTER EIGHT. (should be chapt. 7, pp. 55 to 62)

This chapter gives the outline of Letica's book. The story takes place in a concentration camp for women in Germany, Camp Labor via Rapture. It is run by a man by the name of Krueger. He beats the girls to death if they disobey. Page 59 describes him beating to death Frieda of Warsaw, with a shovel handle.

CHAPTER NINE. (pp. 63 to 91)

Pages 67 to 77 are illustrated drawings of perverted acts. This chapter describes more atrocities on the young girl inmates of Camp Labor via Rapture in Letica's book. It tells of Gretchen, the Camp Commander, who is unable to attract any of the German soldiers who come to fondle the girl prisoners in their Enjoyment duty. "Every so often Gretchen gets hold of one of the girls, drags her into her room, drinking into her nostrils the scent of the man who had just detached himself from the girl." (p. 66) The girls are tied to stools naked, and then flogged to death when they disobey. (p. 83) On "satisfaction duty" 50 girls are strapped naked, each to a bed, while German soldiers have intercourse with them. (p. 86) Letica knew her book was good writing. She receives $1500.00 from Walter Snyder, and will get $5000.00 more when she finishes it. She plans to rent an apartment and "have all kinds of exotic instruments of torture." (p. 91)

CHAPTER TEN. (pp. 92 to 101)

Letica rents an apartment, and buys herself some leather garments and high spike heels. She runs an ad, "Stern lady tutor desires male students in English and Manners. No laggards or shrinkers from discipline need apply. Results guaranteed in the shortest possible time. Madame L. Sternley." (p. 93) She receives 32 answers. She selects one letter and invites James Cousins to be the first student. Pages 98 to 101 describe Letica dressed in her leather clothes and high spike heels, beating "the living crap" out of James Cousins, who is completely nude. She sinks to the bed in exhaustion, and the man, his body streaked with blood, per-

forms an act of cunnilingus on her as she continues to beat him with her strong right arm. (p. 101)

CHAPTER ELEVEN. (pp. 102 to 104)

When Letica goes back to her school to pick up her belongings, she inadvertently walks in on Velma Corley and Wilma Innes. They are lying nude on the bed. Velma performs an act of cunnilingus on Wilma, "Velma on her knees with Wilma's thighs resting on her shoulders." (p. 103) Letica hits them with both hands, "landing about ten blows on each fanny." (p. 103) She enjoys this sensation so much that she leaves realizing "it is just as pleasureable to spank the naked bottoms of a woman, as it was to splay a whip against a man's flesh." (p. 104)

CHAPTER TWELVE. (pp. 105 to 114)

Letica receives a letter from Rodney Wilson, a friend of James Cousins, who tells her "he will give her $50.00 if she succeeds in beating him into unconsciousness." (p. 106) When he arrives Letica ties him over the end of her bed, beating him into unconsciousness. She enjoys this pleasure so much that she decides to put another ad in the paper for stronger men. When Rodney regains consciousness, he tells her how wonderful she is. He gives her $50.00 and leaves. She decides to "go on the prowl" the next day for a female victim. (p. 114)

CHAPTER FOURTEEN.
(no chapt. 13, pp. 115 to 126)

In searching for her female victim, Letica sees a group of women flocking into a building. She joins them. The woman speaker goes into detail on how

to get an hourglass figure by being tightly laced in a corset. Letica meets a woman, named Pauline who admires her high leather boots. Letica invites her to the apartment. She dopes her drink with a few drops of chloral hydrate. Pages 125 to 126 describe Letica spanking Pauline's bare buttocks after she has passed out. Pauline comes to "moaning urgently now, strange sounding orgiastic whimpers, and her body was undulating most determinedly . . . for Pauline the pain had quickened into exquisite ecstasy." (p. 126)

CHAPTER FIFTEEN. (pp. 127 to 134)

Janet Surley is caught sneaking into her room at the girl's school by Miss Evelny Hurd, Dean of women. Miss Hurd promises not to report her if she comes to her room the next day after school. Pages 130 to 134 describe Miss Hurd beating Janet, who is faced against the wall and nude. She beats her with a rubber hose for a full fifteen minutes, "Somehow the lashes had become as subtly exciting as caresses." (p. 133) Janet dresses, and Miss Hurd asks her to kiss her before she leaves. The next week Janet sneaks out again to see her fiance Fred, and when she returns, Miss Hurd is waiting for her.

CHAPTER SIXTEEN. (pp. 135 to 140)

Pages 138 to 140 describe Letica spanking 15 year old Gerald, while his father watches. Gerald resists at first, but then obviously enjoying it as much as his father was enjoying watching it. It was more pleasant than Letica anticipated "to be fondled by a teen-age boy while she beat his bottoms into a glorious shade of dark red with her naked hand." (p. 140)

CHAPTER SEVENTEEN. (pp. 141 to 147)

Letica receives a letter from James Cousins begging her to let him see her in her red thigh boots and white ermine cape he bought her. She writes him if he will sign a document to be her slave body and soul (such as Wanda Von Dunajew had signed in the history of Leopold Von Sachermasoch) she would agree to see him. He agrees, and she thinks of perverted ideas to "work him over." (p. 147) (Page 146 has a grotesque illustrated perversion that does not have anything to do with the story.)

CHAPTER EIGHTEEN. (pp. 148 to 153)

Another letter from James Cousins, signed "your devoted slave" gives Letica great joy, because she was "a woman who in spite of my cruelness to him, would still be slavishly adored by him." (p. 150) She dreams James is beating her, and when she awakens she finds that "she had actually beaten herself in all the spots she could reach." (p. 153) She was so happy, it was exquisite joy to be mistress of all she surveyed. "She, Letica, had made of herself, even as she had dreamed she would, a Female Sultan."

THE END.